

## ***Contingency and Reason: Some Habermasian Reflections on A-Legality***

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### **ABSTRACT**

In this paper I assess the charges raised in Hans Lindahl's book on the *Fault Lines of Globalization* against Habermas' discourse theory of law. I argue, first, that Habermas does not construe legal norms as 'top down' positivizations of a given set of substantial moral norms. Discourse theory provides, rather, a constructivist account of both legal and moral norms as constructed through actual and bottom-up discourses between concrete human beings. Next, I emphasize that this discursive construction is an open-ended process of which the (temporary) outcomes contain much more contingency than Lindahl is prepared to acknowledge. In the final section, I focus more directly on Lindahl's own normative position and raise a few critical questions regarding the relationship between normativity and contingency in the theory of a-legality.

### **KEYWORDS**

A-legality, Habermas, discourse theory of law, Lindahl

### **1. Introduction**

In his book on the *Fault Lines of Globalization*,<sup>1</sup> Hans Lindahl presents us with a powerful and sophisticated analysis of the nature of legal orders. By developing the concept of 'a-legality', Lindahl thereby aims to bring into focus the contingency that necessarily underlies and constitutes every legal order. A-legality is used to refer to actions which put into question the existing distinctions between the legal and the illegal. In contrast with the illegality of illegal acts, which still confirm the legal order as it is, the a-legal reveals the contingency of the prevalent legal categorizations. As Lindahl explains, the a-legal is an 'interruption of legal order' which 'disrupts the conditions of *legal intelligibility* of the situation' and which 'denotes the experience of

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<sup>1</sup> Simple page references in between brackets are references to this book.

*estrangement*' (p. 38). He thereby distinguishes between a 'weak' and a 'strong' dimension of the a-legal. In their weak dimension, a-legal actions make the boundaries of the legal order appear as 'limits', which 'bespeak a gap between extant legal empowerments and those practical possibilities which are unrealized but realizable by the collective'. In their strong dimension, a-legal actions reveal a more radical contingency by making the boundaries appear as 'normative fault lines', which 'mark the gap between the practical possibilities accessible to a collective and practical possibilities which are inaccessible to it' (p. 176).

Throughout his book, Lindahl presents his own analysis of the (contingent) normativity and (contingent) rationality of legal orders as a critique of some predominant views which analyze the rationality of legal orders in terms of 'justification', 'deliberation' and 'reciprocity'. This critique thereby targets philosophers such as John Rawls, Jürgen Habermas, Philip Pettit and others (pp. 133-134). The main charge, most explicitly elaborated in the final chapter of the book, is that these theorists fail to fully understand the contingency of all legal rationality and that, as a result, the idealized presupposition of 'reciprocity' leads to a premature normative closure of the legal order.

In this contribution I will not deal with all of the authors targeted by Lindahl, but simply focus on the work of Jürgen Habermas. My aim is to assess to what extent the charges raised against Habermas' discourse theory of law as developed, mainly, in his book *Between Facts and Norms* (1996), are indeed legitimate. My assessment will thereby proceed in three steps. In the first section I argue that Lindahl often misconstrues Habermas' discourse theory of law: legal norms should not be seen as 'top down' positivizations of a given set of substantial moral norms. Discourse theory provides, rather, a constructivist account of both legal and moral norms whereby these norms are constructed through actual and bottom-up discourses between concrete human beings facing specific problems within their actual life world. In the second section, I emphasize that the discursive construction of norms is an open-ended process of which the (temporary) outcomes contain much more contingency than Habermas' critics are usually prepared to acknowledge. In the third and final section, I focus more directly on Lindahl's own normative position and raise a few critical questions regarding the relationship between normativity and contingency in the theory of a-legality.

## *2. The legal order as embedded in the lifeworld*

In the first chapter of his book, Lindahl emphasizes that legal orders should be understood against the background of the normativity inherent in our social world.

(...) legal orders draw on and *come to stand out* against the background of a more or less anonymous form of normativity, a normativity in which interaction precedes the reflexive operation whereby a manifold of individuals refer to themselves as a ‘we’ who act together, such that paying at the check-out point is simply what ‘one’ does. (...) In this sense, a pre-reflexive and post-reflexive normativity are interwoven in the scenario under discussion. I will refer to this kind of pre- and post-reflexive interaction as *social* interaction, and to the manifold of individuals who interact in this way as *society*. (p. 25)

This quote is interesting because it reveals – pace Lindahl – important affinities with Habermas’ theory of communicative action (Habermas 1984/1987). In this famous theory, Habermas analyzes human interaction as essentially norm-guided whereby the norms regulating our behavior are mostly implicit and generally agreed to. It is only in (exceptional) cases of conflict and disagreement that the underlying norms become the topic of an (ideally reasonable) deliberation in which agreement is restored. In traditional societies, the normative framework endorsing human societies is still inextricably moral, legal and religious at the same time. It is only in the course of modernization that these different spheres are gradually disentangled and that in all of these spheres norms become increasingly formal and rationalized. Nevertheless, even in modern societies, the moral and the legal order should be understood as emerging from within a given lifeworld, whereby discursive attempts at moral or legal rationalization and justification always necessarily remain local in the sense that they arise in response to some local disagreement regarding specific norms. The idea of justifying or rationalizing the lifeworld as a whole is thereby utterly meaningless.

In view of this theoretical background, some of Lindahl’s criticisms seem misguided. At one point, he argues that an approach to practical rationality in terms of justification and deliberation is both abstract and reductive.

Abstract, because it focuses on a legal order as a set of norms, bracketing legal order as a concrete normative whole organized as an interconnected distribution of spatial, temporal, subjective and material dimensions. Reductive, because the standard approach has legal rationality beginning when a norm of action is

questioned, whereas rationality is no less effectual in the ordinary course of joint action under law. (p. 134)

Habermas' view of the legal order is neither abstract nor reductive in this sense. For him, modern law provides a more sophisticated way of solving the increasingly challenging problem of social integration in highly complex and pluralistic modern societies. Law thereby forms an extension and threefold 'functional complement' of morality in the sense that the legal system allows for the proper institutionalization of moral discourse (cognitive complement), for the proper incentives for citizens to behave in certain ways (motivational complement) as well as for the realization of our moral duties in the context of large scale societies (organizational complement). (Habermas 1996, pp. 114-118). Because legal discourse, thus understood, is simply a particular manifestation of the discursive structure of all social integration, the legal order is a normative order embedded within a concrete lifeworld and characterized by an intrinsic form of communicative rationality.

As becomes clearer in the final chapter, Lindahl seems to work with a mistaken picture of Habermasian practical rationality as 'substantial' and 'top down'. The assumption seems to be that Habermas provides us with a substantial set of fundamental normative or moral expectations which provide the given and unquestionable background against which normative differences should be discursively settled (p. 228). These moral expectations are supposedly captured by a moral set of human rights which are subsequently 'positivized' as fundamental (legal) rights (pp. 242-243).

This picture, however, misses the constructivist nature of both Habermas' moral and legal theory. Although there is, indeed, a 'substantial' moral core in Habermas – referring to the need to equally respect the autonomy of all individuals –, this core is very general and abstract and does not automatically translate into some set of norms or human rights (Rummens 2007, Gilabert 2005). It is only through an actual process of deliberation that individuals can 'construct' specific norms which ideally give equal consideration to the interests and values of all concerned. This process of construction is thereby, indeed, the construction of a moral 'we-perspective' – an expression Lindahl himself also keenly uses for his own account – of human beings engaged in joint action in a concrete society (Habermas 1990, pp. 62-68; 1993, pp. 48-54; 2003, pp. 256-261). Habermas thereby forcefully rejects the Kantian image of law as simply a 'positivization' of given moral norms (Habermas 1996, pp. 105-106). Legal rationality is not 'substantial' and 'top down'. Legal discourse, just like moral discourse, is a 'constructive' and 'bottom up' process whereby people start from real situations and real problems in their actual societies and try to come up with 'local' solutions.

In this respect, it is also strange to claim, as Lindahl does, that Habermas would not be aware of the ‘non-reciprocal origin of reciprocity’. Habermas does not – pace Lindahl – face the ‘quandary’ of explaining ‘how practical discourse gets started in the first place’ (p. 236). The lifeworld we are born in is contingently given. Discourse starts as soon as someone says ‘no’ to given practices and challenges existing norms because he or she feels that they are no longer justifiable. And although the communicative structures inherent in the lifeworld thereby reveal the possibility of changing this lifeworld on the basis of a reciprocal form of reasonable discourse, this inherent possibility remains a *counterfactual* ideal which is never fully realized. In this sense, our actual life world is indeed characterized by all sorts of asymmetry and non-reciprocity and the ideal of reciprocity remains, precisely, that: an ideal. Reciprocity is never given, but only promised in the ‘future-oriented character, or openness, of the democratic constitution’ (Habermas 2001a, p. 774, quoted by Lindahl on p. 236).

### *3. Legal discourse remains open-ended*

Of course, when Lindahl talks about the non-reciprocal origin of reciprocity, he is not only concerned with the non-reciprocal starting point of deliberation. His main concern is conceptually more sophisticated. Although he emphasizes that he does not reject the idea of reciprocity as such, Lindahl is keen to emphasize what he calls ‘the blind spot’ of reciprocity: the fact that all legally institutionalized forms of reciprocity are always necessarily also based on some form of exclusion (p.238-239). He believes, therefore, that the idea of reciprocity understood as an ideal of reasonable discourse implies a misguided and impossible attempt to ‘achieve unity in the sense of *all-inclusiveness*’ (p. 231). The idea of reciprocity understood in terms of a reversibility of perspectives would, thereby, ‘transform a politics of inclusion into a politics of assimilation’ (p. 232). In other words, discourse theory is blind to the fact that

acts of boundary-setting which institute relations of reciprocity are also always exposed to being a form of domination *because* they bring about and enforce relations or reciprocity. (p. 239)

The charge that discourse theories of law and morality lead to forms of assimilating closure is not new. Nevertheless, this criticism is not as obviously warranted as the critics assume. As emphasized by Seyla Benhabib (1992, pp. 158-169), for instance, the point of discourse theory is precisely to take seriously the other as a concrete other with her own needs, values and concerns. There is, in this sense, much more ‘contingency’ involved in the construction of a moral we-perspective than usual-

ly recognized. Again, discourse starts from specific problems and misgivings of actual and particular human subjects. The process of deliberation is not meant to make abstraction of this particularity, but aims rather to find a way of combining or reconciling the specific needs of the one with the different needs of the other. It is precisely because only the people concerned themselves are capable of knowing and expressing their own needs and concerns that discourse theory emphasizes the need for *actual* deliberation rather than advocacy deliberation by some experts or philosophers. The actual perspectives of real people are the ineliminable and constitutive elements of the we-perspective under construction. This means, in the terminology used by Habermas, that the specific content of the moral we-perspective will always be ‘colored’ by contingent personal and cultural ‘ethical’ elements (Habermas 1998, p. 225). The precise interpretation of the freedom of religion, for instance, can and will legitimately differ from one country to the next, precisely because the specific interpretation of this freedom will depend upon the specific history and the specific cultural, social and economic circumstances of the legal order concerned. In contrast with Lindahl’s assumption, discourse theory is not geared towards the elimination of the ‘strangeness’ of the other. Recognizing the other as a concrete other means for Habermas, in terms that Lindahl himself would have to endorse (pp. 247-248), the inclusion of the other *as* a stranger.

The ‘inclusion of the other’ means rather that the boundaries of the community are open for all, also and most especially for those who are strangers to one another and want to remain strangers. (1998, p. xxxvi)

Chantal Mouffe has criticized discourse theory for working with an ideal of a reconciled society in which all genuine conflict is overcome. Habermas emphasizes, of course, that the ideal of a reasonable discourse leading to consensus is a *counterfactual* ideal. But, Mouffe argues, the gap between actual and ideal discourse is thereby understood in merely ‘empirical’ terms. If only enough time were available, the ideal of an overall consensus could, in principle, be achieved in some future moment in time. Mouffe argues that Habermas therefore mistakenly conceives of full reconciliation or full reciprocity as a conceptual possibility. In response, Mouffe claims that the gap between the actual and the ideal should be understood as an ontological gap and the idea of a full reconciliation as an ontological impossibility (Mouffe 2000, pp. 48, 88, 98, 137).

Whether or not Habermas would agree with the claim that he understands the counterfactual nature of ideal discourse in merely ‘empirical’ terms, is not entirely clear. It is true that in some of the earliest formulations of his discourse theory of ethics, he assumes the possibility of an at least sufficient if not an actual realization of

the ideal presuppositions of rational speech (Habermas 1990, p. 92; 1984, pp. 179, 528; 1993, pp. 55–56). In his later work, on the other hand, he explicitly takes the opposite position by clearly stating that these presuppositions should not be ‘hypostatized into the ideal of a future condition in which a definitive understanding has been reached’. The ideal of an intact intersubjectivity ‘(...) must not be filled in as the totality of a reconciled form of life and projected into the future as a utopia.’ (Habermas 1992, pp. 144–145)

A full analysis of whether or not Habermas himself recognizes the ‘ontological’ nature of the impossibility of a reconciled society, is beyond the scope of the present contribution. At this point in the argument, it suffices to say that I personally believe that an adequate discourse theory of law and morality could and should recognize the ‘ontological’ nature of the gap between the actual and the ideal and, thus, recognize the essentially open-ended nature of all moral and legal discourse (Rummens 2007, 2008). This ‘ontological’ open-endedness automatically follows, in my view, from the historical nature of the contingent ‘ethical’ elements which are necessarily always present in every actual interpretation of the moral we-perspective. Here, Habermas himself talks about the ‘existential provinciality vis-à-vis the future’ (Habermas 2003, pp. 245–246, 259) of all moral norms. Precisely because the specific needs and values of all people concerned are contingent and historical, every specific interpretation of the requirements of reciprocity will necessarily remain contingent and open to future changes in view of changing personal and historical circumstances. Because discourse theory aims to take seriously the concreteness and contingency of individuals in the lifeworld, full reconciliation and full reciprocity are necessarily always postponed in infinitum.

In this context, Habermas – or, at least, Habermasians such as myself – could endorse much of what Lindahl says about the non-reciprocal element present in all actual legal norms.

To positivize human rights in a global legal order requires a non-reciprocal act that seizes the initiative to *determine* the concept of humanity for legal purposes, to *limit* that which is germane from a legal perspective as constituting *our* ‘common humanity’. And this non-reciprocal seizure entails a preferential differentiation concerning relevant and irrelevant practical possibilities, with a view to fixing what defines *us*, the members of a global polity, as human beings. This preferential differentiation calls forth the possibility of irreducible conflict about what constitutes the humanity of human beings. (p. 242)

Although Lindahl makes a distinction between ('pre-positive') moral human rights and positive legal rights which is alien to Habermas<sup>2</sup>, the core idea expounded here holds within the Habermasian framework for moral and legal norms alike: every actual moral and legal norm provides a specific determination of the concept of a free human being which remains contingent in the sense that it is colored by the specific historical contingency of the collective 'we' that makes the determination and in the sense that it necessarily remains open to future contestation.

#### 4. *Listening to strangers*

As I have tried to show in the previous sections, discourse theory allows for much more contingency than its critics are usually willing to grant. Interestingly, the recognition of contingency in discourse theory even extends – to a limited degree – to the normative core of the theory. Here, Habermas himself, for instance, identifies the 'dogmatic' core of the discourse theory of law in terms of the idea of autonomy.

Certainly, this [proceduralist] understanding [of law], like the rule of law itself, retains a dogmatic core: the idea of autonomy according to which human beings act as free subjects only insofar as they obey just those laws they give themselves in accordance with insights they have acquired intersubjectively. (Habermas 1996, pp. 445-446)

Although in his earlier works, he still tried to provide a transcendental justification of his discourse theory, the later Habermas goes so far as to acknowledge that there is a moment of choice – albeit a choice without alternatives – involved in our commitment to the possibility of normative justification and the idea of freedom.

Yet this 'resolve to freedom' [*Entschluß zur Freiheit*] is not up to us because the moral language game that is inscribed in the communicative form of life could not be maintained in any other way. (Habermas 2003, p. 249)

Lindahl similarly acknowledges that his theory is a normative theory. The theory of a-legality does not lead to a form of relativism but rather to a form of 'non-relational obligation' to the outside.

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<sup>2</sup> For Habermas, human rights should similarly be understood in a constructivist manner as only temporary and fallible interpretations, see Habermas 2001b, pp. 120-121.



Most generally, this non-relational obligation involves introducing a certain forbearance or restraint into the process of setting the boundaries of (il)legality, such that the first-person plural perspective of the collective questioned by the strong dimension of a-legality is not rendered absolute. (p. 249)

The non-relational obligation of restraint thereby does not aim to include or assimilate the outside but rather to safeguard it as it is.

A politics of a-legality can only respond to unorderable normative claims by acknowledging that they belong to an outside which it ought to safeguard *as* an outside. (p. 254)

Although these normative concerns seem laudable, I want to end my contribution by raising two questions in their regard.

First of all, it remains somewhat unclear where this normative concern comes from. Lindahl suggests that it directly follows from his analysis of the contingent nature of legal orders, in the sense that ‘the finite questionability and finite responsiveness of a legal collective’ ‘entails’ both a relational obligation towards what is part of the legal order as well as the aforementioned non-relational obligation of forbearance towards what resists inclusion (p. 249). It is hard to see, however, why an analysis of the contingency of legal orders would imply such a positive obligation towards the outside. Here, the situation resembles the situation of relativism as a metaethical position. As argued by Kim and Wreen (2003), a theoretical endorsement of relativism implies neither a moral commitment to tolerance nor a commitment to intolerance. Similarly, Lindahl’s analysis of a-legality and the necessarily contingent nature of every legal order proceeds on a descriptive meta-level that does not seem to ‘entail’ any moral commitments either way. As Lindahl himself recognizes in his subsequent discussion of the Schmittian concept of the exception as a way of dealing with a-legality, the response towards what is outside could go in two very different directions.

On this reading, exceptional measures are the common root of boundary-setting undertaken either to neutralize and destroy, or to preserve and sustain, what radically questions the legal collective. (p. 251)

Lindahl clearly opts for the preservation rather than the neutralization of what is outside, but why? Of course, he does not necessarily have to provide us with an answer. Ultimate justifications of our moral commitments are probably chimaeras. Nevertheless, it is interesting that, here too, Lindahl seems to find himself in the same

boat as the Habermasians, ultimately having to rely on a – dare we say – ‘dogmatic’ commitment to ‘preservation’.

My second question concerns the precise nature of Lindahl’s notion of restraint. In a passage quoted earlier, he criticized discourse theory for failing to recognize that ‘acts of boundary-setting which institute relations of reciprocity are also always exposed to being a form of domination’ (p. 239). Here, the concern for the outside seems to be a concern about a possible ‘domination’ of what is outside. But what is the opposite here of ‘domination’? Isn’t that necessarily some form of ‘recognition’ and ‘inclusion’? Of course, Lindahl emphasizes that the outside should be safeguarded ‘as an outside’. Nevertheless, in order to safeguard the outside – by means of a ‘dialogue’, as he stresses – some kind of ‘relation’ towards the outside seems to be inevitable. Lindahl seems to be very much aware of the paradoxical nature of safeguarding the outside as an outside and struggles for words. He talks about a ‘*hiatus* – a relation and a non-relation – between the own and the strange’ (p. 255) and about the dialogue as ‘a *dia-logos*, that is, a rationality of the in-between’ (p. 255). Although I am not unsympathetic to these formulations and concerns, it seems strange that Lindahl refuses to bite the bullet here and admit that a (non-)relation with the outside remains a relation nonetheless. In order to ‘preserve’ the outside from ‘domination’, we have to establish a dialogical relationship allowing us to – why not – ‘include’ the other as, in Habermas’ words, ‘a stranger who wants to remain a stranger’.

It seems to me that Lindahl is struggling here with some kind of dilemma. On the one hand, he aims to portray the outside as some kind of ‘radical’ and ‘strange’ outside that escapes the categorizations of our ‘own’ order. At one point, he thereby suggests, using an expression of Emiliós Christodoulidis, that the complaint about our legal order expressed by the other through his a-legal actions manifests itself as an ‘objection that cannot be heard’ (p. 183). Of course, the problem with an objection that cannot be heard is... that it cannot be heard... and therefore not be taken into account in any way. Here the radically strange threatens to become the radically incommensurable which simply cannot enter or ‘irrupt’ into our own legal order. On the other hand, however, the acknowledgment that the stranger should be able to meaningfully manifest herself in some kind of (non-)relational dialogue already implies an acknowledgment of some minimal kind of commonality whereby we at least recognize each other as human beings, able to speak, and, in our vulnerability, always threatened by the possibility of domination.

I believe, and there are passages in Habermas along the same lines, that this minimal kind of moral commonality is what ultimately lies at the bottom of our moral and legal orders alike. Here, I strongly disagree with Lindahl’s critique of Benhabib,

when he argues that our dialogue with a would-be immigrant is necessarily a political and not a moral one.

(...) how can I enter into a *moral* dialogue with you about whether you may become a member of our polity, now or in the future? After all, the whole point of the dialogue is *political*: you request to join ‘*our* association’, not *an* association in general. When providing you with reasons to this effect, I act as a member of the community, not as a human being. Accordingly, our dialogue is asymmetrical (...) To overcome this asymmetry, you must invoke a right to membership of some kind contained in or implied by the schedule of rights enacted by the political community to which I belong, not the fact that you and I are human beings. (pp. 245-246)

This is a strange passage because, in contrast with what this fragment suggests, a-legality refers precisely to a situation in which the stranger, as an outsider, *cannot* possibly invoke the existing legal order and the rights ‘contained in or implied by’ them to make her case. The stranger is a stranger to this legal order. If she wants to make a claim, it is a claim from the outside of the existing, positivized set of rights as they exist. But precisely because she is a human being with a human face, able to speak, she is able – through her a-legal actions – to *morally* challenge the forms of (legal) domination and exclusion she is being subjected to.

As Habermas has argued:

Each must be able to recognize him- or herself in all that wears a human face. To keep this sense of humanity alive and to clarify it (...) is certainly a task from which philosophers should not feel themselves wholly excused, even at risk of having the dubious role of a ‘purveyor of meaning’ attributed to them. (Habermas 1992, p. 15)

This kind of quote will probably worry Lindahl because he believes that all reference to ‘humanity’ is already exclusionary in itself. I think this worry is mistaken precisely because ‘humanity’ is, for Habermas, not a ‘substantial’ and ‘top down’ concept, but rather a concept the meaning and content of which are constantly at stake in our open-ended moral and legal ‘dialogue’.

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